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IN THE
Supreme Court of the United States

MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD.,

Petitioner,

v.

ROMAG FASTENERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

MICHAEL A. PASKIN
Counsel of Record

825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1760
Facsimile: (212) 474-3700

J. Wes Earnhardt
Jessica R. Buturla
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

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QUESTION PRESENTED FOR REVIEW

Whether, when a basis for moving for judgment as a matter of law pursuant to Rule 50 arises after the close of evidence and after Rule 50(a) motions have been taken and decided by the District Court, a party is precluded from bringing a post-verdict motion for judgment as a matter of law on that basis pursuant to Rule 50(b).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner is Mitzi International Handbag & Accessories, Ltd., who was the defendant-appellant below and shall be referred to as "petitioner", "defendant", or "Mitzi" throughout this petition. The respondent is Romag Fasteners, Inc., who was the plaintiff-appellee below and shall be referred to as "respondent", "plaintiff", or "Romag" throughout this petition.

Mitzi is a private company that has no parent corporation, and no publicly-held company holds ten percent or more of Mitzi's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mitzi International Handbag & Accessories, Ltd. ("Mitzi") respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Federal Circuit, entered on February 15, 2006.

CITATION TO OPINIONS BELOW

The Judgment of the Court of Appeals, entered on February 15, 2006, is not officially reported but is annexed hereto as Appendix A. That judgment affirmed the February 24, 2005, Judgment of the United States District Court for the Southern District of New York (Kaplan, J.) which is attached hereto as Appendix B. The February 24, 2005 Judgment of the District Court was entered pursuant to the February 16, 2005, Order (Corrected) of the District Court, which denied defendant Mitzi's motion for judgment as a matter of law or, in the alternative, a new trial, and awarded

plaintiff Romag Fasteners, Inc., enhanced damages and attorneys' fees. The February 16, 2005 Order (Corrected) is not officially reported but is annexed hereto as Appendix C. The Judgment of the Court of Appeals also affirmed the District Court's exclusion of certain evidence in rulings that are not the subject of this Petition.[1]

JURISDICTION

The purported bases for subject matter jurisdiction in the District Court were 28 U.S.C.§§ 1331, 1332, and 1338(a). The Judgment of the United States Court of Appeals for the Federal Circuit was entered on February 15, 2006. Petitioner's petition to the Court of Appeals for the Federal Circuit for panel rehearing was denied on March 13, 2006; that Order is annexed hereto as Appendix D. This petition is timely filed within 90 days of the denial of the petition for rehearing, 28 U.S.C. 2101(c); Sup. Ct. R. 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The question presented in this case concerns Federal Rule of Civil Procedure 50, promulgated pursuant to 28 U.S.C. § 2072. Rule 50 provides that:

> (a) **Judgment as a Matter of Law.**
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be

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[1] Citations to the orders and judgments below which have been included in the Appendix are cited as "App.__".

maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case of the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment–and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law or;

(2) if no verdict was returned

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

STATEMENT OF THE CASE

Introduction

This petition raises for this Court's consideration an issue of critical importance to the fair and uniform administration of federal trial and post-trial procedure, specifically as relates to patent actions in district courts throughout the country and in the Federal Circuit.

Mitzi seeks review of the Federal Circuit's summary affirmance of the denial of a motion under Federal Rule of Civil Procedure 50(b) by Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York. Relying on *Hilord v. Ricoh*, 875 F.2d 32, 37 (2d Cir. 1989), the District Court held that Mitzi's failure to move for judgment as a matter of law at the close of all the evidence under Rule 50(a) precluded it from moving for judgment as a matter of law after the return of the verdict under Rule 50(b). (App. C-2.) The District Court came to this conclusion despite the fact that Mitzi could not possibly have filed a Rule 50(a) motion at the close of all the evidence because the grounds for its motion did not exist until after pre-verdict Rule 50(a) motions had been invited, considered and decided by the District Court.

Specifically, Mitzi's post-trial Rule 50(b) motion was premised on an inconsistency between the District Court's claim construction of the patent-in-suit and its prior ruling as a matter of law concerning the accused product made in granting summary judgment of noninfringement with respect to a related patent. Because the District Court did not articulate its claim construction of the patent-in-suit until after the close of the evidence at trial and after inviting the parties to make motions under Rule 50(a) and then ruling on those motions, Mitzi could not possibly have raised that argument until after the "close of all the evidence" at which point the "court is considered to have submitted the action to the jury". Fed R. Civ. P. 50(b).

As such, Mitzi had no opportunity to make its meritorious argument on a Rule 50(a) motion at the close of all the evidence, and it raised the argument at the next opportunity specifically afforded it under the Federal Rules of Civil Procedure – a post-verdict Rule 50(b) motion. In refusing to consider the merits of Mitzi's Rule 50(b) motion, the District Court deprived Mitzi of its only opportunity to raise the dispositive argument that the District Court's claim construction mandated judgment of noninfringement in favor of Mitzi based on the District Court's prior articulation of the law of the case in its summary judgment opinion. The Federal Circuit affirmed the District Court's decision without an opinion pursuant to Fed. Cir. R. 36. (App. A-2.)

If permitted to stand, the District Court's decision, which was implicitly endorsed by the Federal Circuit in its summary affirmance, would deprive litigants of any opportunity to raise potentially dispositive legal issues under the Rules. Such an unbending application of Rule 50(b) that implies a requirement of a pre-verdict predicate even in circumstances where the argument that forms the basis for such motion did not exist at the time of the close of all the evidence conflicts with its fundamental purposes and is inconsistent with both the manner in which the Rule is applied by the Circuit Courts and the way in which this Court has interpreted Rule 50.

Statement of Facts and District Court Opinion

In this patent infringement suit, Romag contends that Mitzi has infringed two patents for magnetic snap fasteners which are owned by Romag. The two patents are U.S. Patent No. 5,722,126 (" '126 Patent"), which was filed on May 22, 1996, and issued by the United States Patent Office on March 3, 1998, and U.S. Patent No. 5,933,926 (" '926 Patent"), which was filed on January 26, 1998, as a continuation of the application that ultimately issued as the '126 Patent. The District Court granted Mitzi's motion for summary judgment of noninfringement of the '926 patent.

Romag Fasteners, Inc. v. Mitzi Int'l Handbag & Accessories Ltd., 323 F. Supp. 2d 512, 523 (S.D.N.Y. 2004). The District Court denied Mitzi's motion for summary judgment with respect to the '126 patent, *id.*, and that was the only patent-in suit at the time of the trial.

The '926 and '126 patents are closely related patents which disclose and claim an invention relating to magnetic snap fasteners consisting of a female section containing a magnet and a male section which aligns with the female section to close the fastener. The male section, which is the only one at issue in this case, consists of three components: a base washer, attachment legs that connect the section to the handbag, and a tubular stem used to connect the washer to the legs. At issue in this action was Claim 3 of the '126 patent, which requires that the attachment legs of the male section be "rotatable" vis-à-vis the base washer of the male section. Claim 8 of the related '926 patent includes the similar requirement that the attachment legs be "non-rigidly connected" to the base washer.

On Mitzi's motion for summary judgment, the District Court construed those claim limitations differently, and on that basis granted summary judgment of noninfringement only with respect to Romag's '926 patent. *Romag*, 323 F. Supp. 2d at 520-23. The District Court found that with respect to the '926 patent, "attachment legs are 'rigidly' connected if they resist rotation and 'non-rigidly connected' if they do not resist rotation." *Id.* at 521. In contrast, the court's construction of the term "rotatable" as used in Claim 3 of the '126 patent did not require that attachment legs be "non-rigidly connected". *See id.* at 519-20. Then, on its examination of Mitzi's magnetic snap fasteners that were accused of infringing both patents, the District Court ruled as a matter of law that "no reasonable juror could find that [the attachment legs] do not 'resist' rotation" and held that, because they are therefore "rigidly connected" instead of "non-rigidly connected" to the base washer, summary judgment was appropriate with respect to the '926 patent.

See id. at 523. Because the '126 patent was not construed at that stage to include the "non-rigidly connected" requirement, the District Court's finding regarding the characteristics of Mitzi's snaps — *i.e.*, that they are "rigidly connected"— did not mandate entry of summary judgment of noninfringement with respect to the '126 patent as it did with respect to the '926 patent. *Id.* at 524.

Accordingly, the parties proceeded to trial with respect to the '126 patent, after which the jury returned a verdict finding that Mitzi infringed the '126 patent. Had the District Court continued to construe the '126 patent at trial as it had at the summary judgment stage, there may have been some basis for that finding. The District Court did not do so, however, and instead gave a new claim construction of the '126 patent that made it legally impossible for Mitzi to have infringed the '126 patent.

Specifically, after the close of evidence and after Rule 50(a) motions were invited and decided, the District Court articulated a revised construction of the term "rotatable" in the '126 patent. (J.A. 737.)[2] In the afternoon of the third day of trial, both parties rested, the District Court dismissed the jury, and immediately thereafter stated to the parties: "I will take motions now." (J.A. 668.) Romag moved for judgment against Mitzi's invalidity defense and counterclaim, which was granted, (J.A. 671), and on its claim of infringement, which was denied (J.A. 673).

The next morning, the District Court held a charging conference in which, *inter alia*, it articulated how it would construe the term "rotatable" in the '126 patent. (J.A. 681-89.) After the charging conference, the jury returned, the parties made closing arguments and the District Court

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[2] "J.A. — " refers to the Joint Appendix filed in the Court of Appeals for the Federal Circuit.

instructed the jury on the law. The Court's charge to the jury articulated the revised claim construction of the '126 patent:

> "I instruct you that for purposes of this lawsuit, rotatable means capable of being rotated and not rigidly secured. The pair of legs is not rigidly secured if it does not resist rotation. Rotatable, however, does not imply that the legs must rotate freely. The definition of rotatable should be considered in light of the reasons that the legs were made rotatable, which was to allow coating solutions to reach all surfaces of the fastener thereby giving greater corrosion protection." (J.A. 737-38.)

The revised construction contains the identical requirements that, as a matter of law, had entitled Mitzi to summary judgment on the '926 patent – specifically that the pair of attachment legs (1) is "not rigidly secured" and (2) "does not resist rotation". Indeed, every element of the District Court's simple, four-sentence '126 claim construction is identical to its prior '926 claim construction that entitled Mitzi to a judgment of noninfringement at summary judgment. *See Romag*, 323 F. Supp. 2d at 521-22.

In combination with that revised construction, the District Court's ruling granting summary judgment on the '926 patent — *i.e.*, the finding as a matter of law that Mitzi's snaps are "rigidly connected" and that "no reasonable juror could find that they do not 'resist' rotation", *id.* at 523 — gained new significance. Only after the new claim construction was articulated could Mitzi make the argument that, as the law of the case, the District Court's infringement analysis in its earlier ruling granting summary judgment was necessarily fatal to Romag's claim that Mitzi infringed the '126 patent.

Because the District Court had already invited and ruled on motions for judgment under Rule 50(a), Mitzi took advantage of the next opportunity specified by the Federal

Rules of Civil Procedure to seek judgment as a matter of law and filed a post-verdict Rule 50(b) motion. It asserted, *inter alia*, that the law of the case mandated entry of judgment of noninfringement of the '126 patent.

However, the District Court refused to address the merits of Mitzi's law of the case argument. Instead, it ruled that Mitzi's failure to move for judgment as a matter of law at the close of all the evidence pursuant to Rule 50(a) foreclosed a motion pursuant to Rule 50(b) after the return of the jury's verdict. (App. C-2.) In so doing, the court did not so much as acknowledge Mitzi's argument that it would have been impossible to have raised its law of the case argument when Rule 50(a) motions were taken because the District Court had not yet told the parties how it would construe the '126 patent.[3] Even ignoring the fact that as a matter of logic, Mitzi could not possibly have made an argument based on the court's revised claim construction until after it had articulated that construction, the District Court appears to have applied Rule 50 without a thought for its purposes and inconsistently with both the decisions of this Court and the Circuit Courts of Appeals.

The Federal Circuit's Summary Affirmance

On February 15, 2006, the Federal Circuit affirmed the judgment of the District Court without an opinion, pursuant

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[3] By the District Court's logic, no course of conduct could have preserved the argument for consideration on a 50(b) motion. Even if Mitzi had made a motion for judgment as a matter of law based on the sufficiency of the evidence at the close of all the evidence, such a motion would not not have preserved the law of the case argument because a motion at that time could not have "specifically raised" that argument. Fed. R. Civ. P. 50(a)(2) ("Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment"); *Lambert v. Genessee Hosp.*, 10 F.3d 46, 54 (2d Cir. 1993) (prior 50(a) motion preserves for subsequent 50(b) motion only those arguments "specifically raised in the prior motion" (quoting *Samuels v. Air. Transp. Local 504*, 992 F.2d 12, 14 (2d Cir. 1993)).

to Fed. Cir. R. 36. (App. A.) While it failed to state its reasoning, in affirming the District Court's decision the Federal Circuit implicitly endorsed the District Court's view that Mitzi had waived its right to file a Rule 50(b) motion because it failed to file an earlier motion under Rule 50(a).

REASONS FOR GRANTING THE WRIT

I. The Application of Rule 50(b) Approved by the Federal Circuit Is Inconsistent with this Court's Holding that Waiver Requires the "Intentional Relinquishment" of a "Known Right" and the Plain Language of Rule 50.

The District Court's decision in this case, affirmed by the Federal Circuit without an opinion, deprives parties of the ability to raise potentially dispositive issues of law on post-verdict motions for judgment as a matter of law purely because of the procedural accident that the grounds for such motions did not exist when the parties had the opportunity to file earlier Rule 50(a) motions. This application of Rule 50 to preclude a party from bringing a Rule 50(b) motion where that party "failed" to bring prior Rule 50(a) motion on grounds that did not exist at the time produces an illogical and manifestly unjust result.

District court judges are permitted wide discretion to make determinations throughout the course of a trial that alter the legal complexion of the issues before it and in some cases afford the parties grounds on which to seek judgment as a matter of law pursuant to Rule 50. Settled law provides that when such grounds arise prior to the close of the evidence, a motion is properly brought under Rule 50(a). 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 (2d ed. 1995). If the court denies or defers that motion, and subsequently submits the case to the jury, Rule 50(b) permits a post-verdict motion on those same grounds. *Id.* A motion pursuant to Rule 50(b) is styled a "renewed" motion and from that language courts have inferred that a party must have made a timely and proper

motion for judgment as a matter of law under Rule 50(a) at the close of all the evidence to preserve the ability to renew the motion for judgment under Rule 50(b). *Id.* That is, by failing to bring a Rule 50(a) motion at the close of evidence, a party can waive the right subsequently to bring a motion pursuant to Rule 50(b). *Id.* That framework is sensible when grounds exist pursuant to which a party *could* move for judgment at the close of evidence pursuant to Rule 50(a), but fails to bring such a motion.

However, that waiver rule should not apply in cases where the basis for a motion for judgment as a matter of law did not exist at the time when a Rule 50(a) motion would have been procedurally appropriate. Grounds for judgment as a matter of law can and will arise after the close of evidence. When they do, the next opportunity specified by the Rules for a party to move the court is on a post-verdict Rule 50(b) motion. It is inconsistent with the decision of this Court to deem the right to bring that motion "waived" when it is premised on an argument that previously did not exist. *United States v. Olano*, 507 U.S. 725, 733 (1983) ("[W]aiver [requires] the intentional relinquishment or abandonment of a known right" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).) Indeed, to the extent Circuit Courts have confronted a situation where the argument raised in the Rule 50(b) motion could not possibly have been raised in a timely Rule 50(a) motion, they have held that a Rule 50(a) motion at the close of the evidence was an unnecessary predicate to a proper Rule 50(b) motion. In *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1369 (9th Cir. 1987), the Ninth Circuit held that a Rule 50(a) motion at the close of evidence was not necessary to preserve a Rule 50(b) motion premised on "inconsistencies in the answers given in the [jury's] special verdict" that could not have been known at the close of evidence when a Rule 50(a) motion would have been appropriate. The same result should obtain in the present circumstances.

Perhaps counsel could have sought leave of the court to file some undetermined motion, at some undetermined moment in time in a form and manner not specified by the Rules. But given that the plain language of Rule 50 specifies no earlier opportunity at which Mitzi could have moved for judgment based on its law of the case argument, the failure to have done so can hardly be construed as an "intentional relinquishment or abandonment of a known right". *Olano*, 507 U.S. at 733; *cf. Reed v. Ross*, 468 U.S. 1, 16 (1984) ("If novelty were never cause [for failure to raise an argument], counsel . . . would be obliged to raise and argue every conceivable . . . claim, no matter how far fetched, in order to preserve a right for . . . relief upon some future, unforeseen development . . . .") (citation omitted).

The text of Rule 50 supports that conclusion. Subsection (a) of the Rule states that "[m]otions for judgment as a matter of law may be made at any time before submission of the case to the jury". Subsection (b) then equates "submission of the case to the jury" with "the close of all the evidence". Fed. R. Civ. P. 50(b) ("If . . . the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion."). In the present case, the District Court made clear that the "close of all the evidence" occurred on December 1, 2004, when it stated, "Members of the jury, that concludes the presentation of evidence in this trial", (J.A. 666), and moments later stated to the parties, "I will take motions now", (J.A. 668). Therefore, by the time the District Court articulated its new claim construction of the '126 patent the following day, which would form the basis for the law of the case argument supporting Mitzi's Rule 50(b) motion, the plain language of the Rule suggests that the time for making Rule 50(a) motions had passed because the case had already been "submitted to the jury".

A. Careful Consideration of Rule 50(b) Waiver Is of Particular Importance to Patent Litigation Procedure After *Markman*.

As noted above, it is certainly the case that a Rule 50(b) motion could be the first opportunity available for a party to bring a dispositive issue of law to the trial court's attention. Indeed, following this Court's decision in *Markman v. Westview Instruments*, 517 U.S. 370 (1996), which placed the construction of patent claims squarely in the hands of the court, patent infringement litigation presents this scenario in particularly clear outlines. After *Markman*, "[d]istrict court judges have shown an overwhelming willingness to revisit claim construction rulings" over the course of a proceeding. Edward V. Filardi & Douglas R. Nemec, *The Effect of* Markman *on Patent Litigation: Practical Considerations*, 714 PLI/Pat 225, 253 (2002). Such a "rolling claim construction" approach was explicitly approved under *Markman* by the Federal Circuit, *see Pfizer, Inc. v. Tera Pharms.*, 429 F.3d 1364, 1377 (Fed. Cir. 2005); *Guttman, Inc. v. Kopykake Enters., Inc.*, 302 F.3d 1352, 1361 (Fed. Cir. 2002), and trial courts routinely construe claims after the close of evidence, *see, e.g., Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1580 (Fed. Cir. 1996) (district court construed claims after trial); *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1561-62 (Fed. Cir. 1995) (claim construction rendered at the end of trial was reversed, but timing of construction was implicitly approved); *Johns Hopkins Univ. v. Cellpro*, 931 F. Supp. 303 (D. Del. 1996) (granting a new trial after changing claim construction in connection with deciding Rule 50 motions).

Indeed, the Federal Circuit went so far in *Markman* as to contemplate specifically and even suggest that claim construction "can be accomplished by the court in framing its charge to the jury". *Markman v. Westview Instruments*, 52 F.3d 967, 981 (Fed. Cir. 1995) (*Markman I*); *see also York Prods., Inc. v. Cent. Tractor Farm & Family Ctr.*, 99 F.3d 1568, 1571 (Fed. Cir. 1996) (claim construction was made

after the close of evidence during preparation of jury instructions); *Cellpro*, 894 F. Supp. at 826 ("[O]n the eve of the last day of trial this court finalized the jury instructions and construed the disputed terms in the patents in suit."). This Court should therefore take the opportunity to provide patent litigants with necessary guidance regarding how to navigate Rule 50 in this context.

Furthermore, the present case illustrates how depriving a patent litigant of the opportunity to raise a newly-available argument on a Rule 50(b) motion can result in inconsistent rulings. Notwithstanding the fact that in the present case the District Court had before it the exact same rule of law (*i.e.*, identical claim constructions) to be applied against the exact same operative facts (*i.e.*, the same accused product) in the exact same litigation between the exact same parties, it upheld a result that was the exact opposite of its prior published opinion. The Federal Circuit then allowed those inconsistent results to stand. Had Mitzi been afforded the opportunity to raise its law of the case argument on its Rule 50(b) motion, those inconsistent results could have been avoided.

Those fundamentally inconsistent outcomes represent the very embodiment of manifest injustice and tend to undermine the public's reliance on judicial action. The law of the case doctrine and other related judicial doctrines exist precisely to prevent such results. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[R]es judicata and collateral estoppel [prevent] inconsistent decisions, [and thereby] encourage reliance on adjudication"); *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1485 (2d Cir. 1995) (doctrine of collateral estoppel exists, in part, to "foster reliance on judicial action by minimizing the possibility of inconsistent decisions" (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). Indeed, under the present circumstances it will be impossible for Mitzi, or anyone else, to rely on the outcome of this litigation as a guide to future conduct, because the case now stands for the

proposition that the same accused product both infringes and does not infringe patent claims with identical meanings. That result contravenes the decisions of this Court and the very purpose of the Federal Circuit. *Markman I*, 517 U.S. at 390. ("It was just for the sake of such desirable uniformity that Congress created the Court of Appeals for the Federal Circuit as an exclusive appellate court for patent cases . . . observing that increased uniformity would 'strengthen the United States patent system in such a way as to foster technological growth and industrial innovation,'" (citing H. Rep. No. 97-312 at 20-23 (1981)); *see also Panduit Corp. v. All States Plastic Mfg.*, 744 F.2d 1564, 1574 (Fed. Cir. 1984), ("[The Federal Circuit] was created to achieve uniformity and to reduce uncertainties in [patent law]. This court, thus, has a mandate to achieve uniformity in patent matters . . . . [In fact], [t]hat was the underlying motivation for the creation of this court, and it must remain the spirit and guiding principle of this court.") *overruled on other grounds by Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).

II. This Court Should Grant Certiorari to Clarify its Recent Decision in *Unitherm*.

Although this Court has never addressed the scope of Rule 50(b)'s requirement for a pre-verdict Rule 50(a) motion brought at the close of all the evidence, it has considered and clarified Rule 50 in the context of a party's failure to file a post-verdict motion under Rule 50(b). This Court's prior decisions strongly suggest that in certain circumstances a potentially dispositive issue of law can be brought to the district court's attention, as an initial matter, in a post-verdict Rule 50(b) motion. That possibility has been addressed by the Circuit Courts and given rise to a rich and deep body of case law. It now requires the attention of this Court, which should apply the principles animating its recent decision in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006), to give guidance to litigants on how to navigate a procedural issue not addressed by the express language of Rule 50.

A. *Unitherm* and its Predecessors Interpret Rule 50 Consistent with "Principles of Fairness".

The law of this Court setting out the procedural requirements of Rule 50 stems primarily from five cases, the most recent of which is this Court's decision in *Unitherm*. Those cases identify and adhere to the purposes behind Rule 50 in interpreting and applying it.

When this Court first addressed Rule 50 in *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947), it concluded that in the absence of a post-verdict motion under Rule 50(b), an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand". This Court similarly concluded that a party's failure to file a Rule 50(b) motion deprives the appellate court of the power to order the entry of judgment in favor of that party both where the district court directed the jury's verdict, *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), and where the district court expressly reserved a party's earlier motion for a directed verdict and then denied that motion after the verdict was returned, *Johnson v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 48 (1952). In *Unitherm*, this Court held that the failure of a party to renew a pre-verdict 50(a) motion in a post-verdict 50(b) motion precluded the appellate court from reviewing the sufficiency of the evidence on appeal where the party also failed to move for a new trial. 126 S. Ct. at 987.

As explained in *Unitherm*, the line of cases culminating in that decision is dictated by "principles of fairness" first articulated by this Court in *Cone*. 126 S. Ct. at 986 (quoting *Johnson*, 344 U.S. at 53 (citing *Cone*, 330 U.S. at 217-218)). In *Cone*, this Court explained that for a Court of Appeals to enter a verdict contrary to that delivered by the jury, the appellant must have made a timely motion for a judgment not withstanding the verdict so that "the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss."

Cone, 330 U.S. at 217.[4] This Court then concluded that a timely post-verdict motion permits plaintiff to exercise that right, and permits the district court to exercise its discretionary power to determine whether there should be a judgment, a dismissal, or a new trial.[5] *Id.* at 217-18.

As just described, this Court has faithfully interpreted and applied Rule 50 consistent with its purposes to prevent prejudice to the non-moving party. Such prejudice is wholly wanting in this instance. Mitzi's law of the case argument presented in its Rule 50(b) motion had nothing to do with the sufficiency of the evidence or defects in proof offered during the trial. The District Court was not being asked to evaluate the sufficiency of the evidence at trial, but instead to consider a purely legal question – whether the law of the case doctrine required judgment of noninfringement of the '126 patent in light of the revised claim construction. For the District Court to have considered Mitzi's law of the case argument would in no way have invaded the province of the jury or deprived plaintiff of its opportunity to repair defects in its proof. To the contrary, Mitzi's argument was that the District Court's

---

[4] In *Unitherm*, this Court also stated that "[a] post verdict motion is necessary because '[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart'". 126 S. Ct. at 985-86 (*citing Cone*, 330 U.S. at 216). That secondary purpose, while clearly key to this Court's decision regarding the power of the Circuit Courts, is not implicated here, as a Rule 50(b) motion is heard and considered by the district court in the first instance.

[5] This Court noted in *Unitherm* that when, in *Neely v. Martin K. Eloy Constr. Co.*, 386 U.S. 317 (1967) and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), it held the appellate court *may* direct the entry of judgment in certain circumstances, its decision was informed by these same principles of fairness. *See* 126 S. Ct. at 986 n.3. This Court held that the appellate court could do so under circumstances where "the district court will have had an opportunity to consider the propriety of entering judgment or ordering a new trial". *Id.*

combined prior rulings made it legally impossible for there to be infringement, regardless of the jury's factual determinations or any amount of additional proof offered by the plaintiff.

Accordingly, when, as here, the question is one of law rather than fact, the opposing party is not denied an opportunity to buttress the evidentiary deficiencies in its case. Instead, it violates *Cone*'s "principles of fairness" and is contrary to Rule 50's purposes to deny a party the right to have its Rule 50(b) motion considered due to the timing of the District Court's claim construction. *See Cone*, 330 U.S. at 217. For example, had the District Court in the present case held its charging conference and articulated its claim construction prior to the start of trial, or indeed at any time prior to the close of the evidence, there is no question that Mitzi would have been permitted to raise its law of the case argument on a motion for judgment as a matter of law. The District Court's decision to wait until after the close of the evidence to construe the claims should not act as a permanent bar to Mitzi's argument. As this Court noted in *Unitherm*, Rule 50 was drafted with an eye to its purposes, 126 S. Ct. at 986 n.4, (citing Wright & Miller, *supra*, § 2522). This Court has seen fit to apply Rule 50 consistent with those purposes and should take the opportunity to do so here.

B. Numerous Decisions of the Circuit Courts of Appeals Also Interpret Rule 50 Liberally and Consistent with Principles of Fairness.

Mitzi's position is consistent with the rich body of caselaw from the Circuit Courts addressing the necessary predicates for a Rule 50(b) motion. Incorporating this Court's "principles of fairness" into their own decisions regarding Rule 50, the Circuit Courts, even when holding that a party is precluded under Rule 50(b) from making a post-verdict motion for judgment as a matter of law, have taken a purpose-oriented approach to the application of the pre-verdict motion requirement.

Taking their cue from this Court, Circuit Courts applying this rule have made perfectly clear that "the very purpose" of that requirement "is to give the other party an opportunity to cure the defects in proof that might otherwise preclude him [or her] from taking the case to the jury". *Cruz. v. Local Union No. 3*, 34 F.3d 1148, 1155 (2d Cir. 1994) (citing *Baskin v. Hawley*, 807 F.2d 1120, 1134 (2d Cir. 1986)); *see also Szmaj v. Am. Tel. & Tel. Co.*, 291 F.3d 955, 958 (7th Cir. 2002) ("[T]he plaintiff may ask and may receive permission from the judge to put in some additional evidence to show that there is a jury issue"); *Scottish Heritable Trust v. Peat Marwick Main & Co.*, 81 F.3d 606, 610 (5th Cir. 1996) ("As we have often recited, the two basic purposes of this rule are 'to enable the trial court to reexamine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury" (quoting *MacArthur v. Univ. of Tex. Health Ctr.*, 45 F.3d 890, 896-97 (5th Cir. 1995))); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1388 (7th Cir. 1984) ("[Requiring a prior motion for a directed verdict] gives the opposing party a chance to repair . . . the deficiencies in his [or her] proof before it is too late." (internal citations omitted)); *McCann v. Texas City Ref., Inc.*, 984 F.2d 667, 671 (5th Cir. 1993) ("This Court has repeatedly emphasized that the application of Rule 50(b) should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trail for all concerned in the quest for the truth." (internal citation and quotation omitted)).

When those purposes are satisfied, Circuit Courts have taken a liberal view regarding "violations" of the requirement for a pre-verdict motion made at the close of the evidence. The Seventh Circuit expressed the position of the majority of the Circuit Courts of Appeals in *Benson v. Allphin* where it explained that, "in response perhaps to the opacity of the rule and in an effort to base its decisions on substantive grounds, rather than procedural defaults, this circuit has allowed

something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict." 786 F.2d 268, 274 (7th Cir. 1986) (internal citations omitted); *see also Scottish Heritable Trust*, 81 F.3d at 610 ("Technical noncompliance with Rule 50(b) may be excused in situations in which the purposes of the rule are satisfied." (internal citation omitted)); *Singer v. Dungan*, 45 F.3d 823, 829 (4th Cir. 1995) ("[a] motion for judgment under Rule 50(b) may be granted, despite the movant's failure to renew a previous motion under Rule 50(a) at the close of all the evidence, where the purposes of Rule 50 have been met in that both the adverse party and the court are aware that the movant continues to believe that the evidence presented does not present an issue for the jury." (quoting James W. Moore, *Moore's Federal Practice* § 50.08 (2d ed. 1994)); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1330-31 (6th Cir. 1988) (noting that courts have construed Rule 50(b) "in light of liberal spirit imbuing the Federal Rules of Civil Procedure" (internal quotation omitted)); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 n.3 (2d Cir. 1987) (reassertion of pre-verdict motion at close of evidence excused when purposes of the Rule are satisfied); *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 472-73 (5th Cir. 2000) ("To find that [a party] waived its right to move for JML under these circumstances post-judgment would constitute a 'slavish adherence' to the Rules, a position which we have repeatedly counseled against." (quoting *Scottish Heritable Trust*, 81 F.3d at 611)); *Fed. Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 137-38 (4th Cir. 1987) (holding that even though the defendant failed to raise an issue in his Rule 50(a) motion, review of the issue in a Rule 50(b) motion was proper because the spirit behind Rule 50 was served in that the right to jury trial was not jeopardized and the opposing party had notice of the alleged error so as to cure any defect); *Riverview Inv., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 477 (6th Cir. 1990)

("[T]echnical deviation from Rule 50(b)'s command is not fatal.").

The Circuit Courts have recognized that a literal and categorical application of the Rule can be contrary to its stated purposes and the trial courts have permitted the filing of post-verdict motions despite failure to make a motion at the close of all the evidence when, for example, the trial court has indicated in some manner that asserting the motion is unnecessary, *see, e.g., Best Brands*, 842 F.2d at 587 n.3, the evidence introduced after an initial Rule 50(a) motion is brief, inconsequential, or nonexistent, *see, e.g., Alcatel USA Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 781 (5th Cir. 1999), or where, as described *supra*, the challenge raised in the Rule 50(b) motion is to the consistency of the answers under a Rule 49(a) special verdict and therefore arose post-verdict, *see e.g., Pierce*, 823 F.2d at 1369.

This Court made clear in *Unitherm* that it would not break with precedent in its interpretation of Rule 50 by overlooking the purposes of the Rule, deciding instead to continue to use those purposes as the primary tool in discerning its meaning. *See* 126 S. Ct. at 988. This Court should take this opportunity to clarify, consistent with the Circuit Courts, how the Rule's articulated purposes dictate the proper application of Rule 50(b), and ratify this interpretive approach to the Rule.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to review the decision of the Federal Circuit Court of Appeals.

June 12, 2006

MICHAEL A. PASKIN
Counsel of Record

825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1760
Facsimile: (212) 474-3700

J. Wes Earnhardt
Jessica Buturla
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

Attorneys for Petitioner

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition IS NOT CITABLE AS PRECEDENT. IT IS A PUBLIC RECORD.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1342

ROMAG FASTENERS, INC.,
PLAINTIFF-APPELLEE,

V.

MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD.,
DEFENDANT-APPELLANT.

JUDGMENT

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

in CASE NO(S). 01-CV-01898

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (SCHALL, Circuit Judge, CLEVENGER, Senior Circuit Judge, and DYK, Circuit Judge.

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED FEB 15 2006

/s/ Jan Horbaly

Jan Horbaly, Clerk

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: 02/15/06

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s)in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs

should not be sent to the court. Costs should be paid promptly.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

/s/ Jan Horbaly
JAN HORBALY
Clerk

cc: MICHAEL A. PASKIN
NORMAN H. ZIVIN

ROMAG FASTENERS V MITZI INTL, 2005-1342
DCT - SD/NY, 01-CV-01898

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROMAG FASTENERS, INC.,

Plaintiff,

-against-

MITZI INTERNATIONAL HANDBAG AND ACCESSORIES, LTD.,

Defendant.

01 **CIVIL** 1898
(LAK)

JUDGMENT

Whereas the above captioned case having come before this Court, and the matter having come before the Honorable Lewis A. Kaplan, United States District Judge, and the Court, on February 16, 2005, having rendered its Order (Corrected) granting defendant's motion to withdraw the January 12 order and January 14 judgment and vacating those papers, denying defendant's motion for judgment as a matter of law or, alternatively, a new trial, granting plaintiff's motion for enhanced damages and other relief to the extent that: a) plaintiff shall recover of defendant damages in the amount of $6.0 million together with attorneys' fees and expenses of $428,920.33 and prejudgment interest to be computed by the Clerk at the appropriate rate pursuant to 28 U.S.C. 1961 on the sums listed from the dates indicated in the Order (Corrected) dated February 16, 2005; b) plaintiff shall have an injunction in the form annexed as Exhibit F to the joint pretrial order; and c) the Clerk is directed to enter final judgment in accordance with the Order (Corrected) dated February 16, 2005, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order (Corrected) dated

February 16, 2005, final judgment is entered as follows: defendant's motion to withdraw the January 12 order and January 14 judgment is granted and those papers are vacated; defendant's motion for judgment as a matter of law or, alternatively, a new trial is denied; plaintiff's motion for enhanced damages and other relief is granted to the extent that: a) plaintiff shall recover of defendant damages in the amount of $6.0 million together with attorneys' fees and expenses of $428,920.33 and prejudgment interest at the appropriate rate pursuant to 28 U.S.C. 1961 on the sums listed from the dates indicated in the Order (Corrected) dated February 16, 2005 of $698,876.47 for a total sum of $7,127,796.80; and b) plaintiff shall have an injunction in the form annexed as Exhibit F to the joint pretrial order.

Dated: New York, New York
February 24, 2005

J. MICHAEL McMAHON
Clerk of Court

BY:

/s/ [Illegible]
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROMAG FASTENERS, INC., Plaintiff, -against- MITZI INTERNATIONAL HANDBAG AND ACCESSORIES, LTD., Defendant.	01 Civ. 1898 (LAK)

ORDER
(CORRECTED)

LEWIS A. KAPLAN, *District Judge*.

The jury in this case found on December 2, 2004 that the defendant willfully infringed plaintiff's '126 patent and awarded damages of $4.5 million. On December 16, plaintiff filed a post-trial memorandum in support of its application for enhanced damages, attorneys fees, prejudgment interest and injunctive relief. (Docket item 64) By order dated January 12, 2005, following the apparent expiration of the time for defendant to respond to the motion, the Court granted the motion in part. Judgment was entered on January 14, 2005. Defendant now moves to withdraw the January 12, 2005 order and the ensuing judgment (docket item 72) and for judgment as a matter of law (docket item 77).

The Motion to Withdraw the Order and Judgment

As defendant has pointed out, the Court granted plaintiffs post-trial motion for enhanced damages and other relief in the mistaken belief that defendant had defaulted on the motion. As defendant had not been heard fully, defendant's motion to withdraw the January 12, 2005 order and the January 14, 2005 judgment will be granted.

Defendant's Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial

At the close of the evidence, the Court invited motions. (Tr. 338-43) Defendant made none. Having failed to move for judgment as a matter of law at the close of all the evidence, it may not do so now. *E.g., Hilford Chemical Corp. v. Ricoh Electronics, Inc.*, 875 F.2d 32, 37 (2d Cir. 1989). Its attempts to bring itself within one of the few exceptions to this rule are unconvincing. Indeed, the grounds it asserts in an effort to show manifest injustice are coextensive with the grounds supporting the merits of its motion for judgment as a matter of law. If adopted, its argument would excuse all failures to seek judgment as a matter of law at the close of all the proof whenever such a motion would have been meritorious. Moreover, it now seeks judgment on two issues – willfulness and damages – that it did not even raise by motion at the close of the plaintiff's case.

While this procedural default does not foreclose so much of the motion as seeks a new trial, that branch of the motion is without merit.

In determining whether to order a new trial on the ground that a verdict is against the weight of the evidence:

> "The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the

> complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not."[1]

As the Court made plain, it probably would have decided the issue of infringement differently than did the jury had the Court been the trier of fact. That is not to say, however, that the verdict was unsupported by evidence or otherwise infirm. As plaintiff's memorandum demonstrates, the evidence was more than sufficient to support the verdict, and the finding of infringement reflects no miscarriage of justice. *See* Pl. Mem. 4-13.

Defendant's argument on willfulness is far weaker. It presents a highly selective view of the record, ignoring all evidence that is unfavorable to its position. There was substantial evidence that Mitzi was well aware of the '126 patent but failed to obtain advice of counsel before importing and selling infringing snaps. The jury was free to disregard Attorney LaLone's testimony concerning the competence of his opinion, and it was entitled to conclude that defendant did not rely on that opinion in good faith.

Finally, defendant's plea for a new trial on damages is without merit, substantially for the reasons set forth at pages 16-19 of plaintiff's memorandum.

Accordingly, the motion for judgment as a matter of law or, alternatively, for a new trial will be denied.

---

[1] *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978) (quoting 6A MOORE'S FEDERAL PRACTICE ¶ 59.08[5], at 59-160-59-161 (1973)).

Plaintiff's Motion for Enhanced Damages, Attorney's Fees and Other Relief

The withdrawal of the January 12, 2005 order and the ensuing judgment revives plaintiff's motion. Nevertheless, having considering defendant's papers, everything that was said in that order remains applicable. The Court adds only the following additional comments:

The jury, as was its province, resolved the infringement issue in plaintiff's favor. Although, as noted, the Court might have come out the other way on that question, it agrees with the jury's finding of willfulness. There was persuasive evidence that defendant intended to copy the plaintiff's invention as closely as possible, and its evidence of good faith reliance on competent counsel was not compelling. Defendant's claim of financial hardship is unpersuasive and borders on the disingenuous for the reasons set forth at pages 4 through 6 of plaintiff's memorandum. And even if one were to put aside the discovery misconduct, its frivolous invalidity defense and obstructive refusal to stipulate to the admission of sales summaries support a conclusion of litigation misconduct. Considering all pertinent factors together, a 33 percent enhancement of the damage award is well within the bounds of reason – indeed, it arguably is quite lenient.

Conclusion

For the foregoing reasons, as well as those set forth in the January 12, 2005 order, the pending motions are resolved as follows:

1. Defendant's motion to withdraw the January 12 order and January 14 judgment is granted and those papers are vacated.

2. Defendant's motion for judgment as a matter of law or, alternatively, a new trial is denied.

3. Plaintiff's motion for enhanced damages and other relief is granted to the extent that:

a. Plaintiff shall recover of defendant damages in the amount of $6.0 million together with attorneys' fees and expenses of $428,920.33 and prejudgment interest to be computed by the Clerk at the appropriate rate on the sums listed from the dates indicated below:

From	**Amount**
April 30, 2000	$1,269,938
April 30, 2001	$1,490,798
April 30, 2002	$1,159,509
October 31, 2002	$ 579,755

The rates applicable from time to time shall be determined in accordance with 28 U.S.C. § 1961.

b. Plaintiff shall have an injunction in the form annexed as Exhibit F to the joint pretrial order.

c. The Clerk shall enter final judgment in accordance with this order. The Court has considered all of defendant's other arguments. None warrants a different result.

SO ORDERED.

Dated: February 16, 2005
(Original dated February 14, 2005)

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

It is ORDERED that counsel to whom this Order is sent is responsible for faxing a copy to all counsel and retaining verification of such in the case file. Do not fax such verification to Chambers.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1342

ROMAG FASTENERS, INC.,

Plaintiff-Appellee,

v.

MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD.,

Defendant-Appellant.

ORDER

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Schall, Circuit Judge, Clevenger, Senior Circuit Judge, and Dyk, Circuit Judge.

A petition for rehearing having been filed by the Appellant,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on March 20, 2006.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 03/13/2006

cc: Michael A. Paskin
Norman H. Zivin

ROMAG FASTENERS V MITZI INTL, 2005-1342
(DCT - 01-CV-01898)

Supreme Court, U.S.
FILED
JUL 12 2006
OFFICE OF THE CLERK

No. 05-1594

IN THE

Supreme Court of the United States

MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD.,

Petitioner,

v.

ROMAG FASTENERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

DONALD R. DUNNER
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000

NORMAN H. ZIVIN
Counsel of Record
COOPER & DUNHAM LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 278-0400

Attorneys for Respondent

202224

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is a party precluded from bringing a post-verdict motion for judgment as a matter of law pursuant to Rule 50(b) F.R.Civ.P. when the party failed to move for judgment as a matter of law after a patent claim construction ruling but prior to submission of the case to the jury pursuant to Rule 50(a) F.R.Civ.P.?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Romag is a privately-held company, has no parent and no publicly-held company owns ten percent or more of Romag's stock.

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9 Moore's Federal Practice § 50.20[1] (2001) 6

INTRODUCTION

Respondent ROMAG FASTENERS, INC. ("Romag") hereby opposes the issuance of a writ of certiorari to the Court of Appeals for the Federal Circuit sought by petitioner MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD. ("Mitzi").

Mitzi seeks a writ of certiorari to review a judgment issued without opinion of the Court of Appeals for the Federal Circuit, affirming a judgment of the District Court for the Southern District of New York entering a jury verdict. Although there is virtually no record for this Court to review, Mitzi claims that it was deprived of its right to challenge the jury verdict because it failed to make a motion for judgment as a matter of law prior to submission of the case to the jury.

Mitzi's failure to comply with the Federal Rules of Civil Procedure was a matter of trial strategy or a blunder. Mitzi has to live with the consequences of its acts and accept the verdict of the jury and two reviewing courts. There is no constitutional issue or split of authority among the circuits justifying this court's review of Mitzi's failure to comply with the rules. There is no good reason to grant the writ sought by Mitzi.

STATEMENT OF THE CASE

Mitzi's statement of facts is incorrect in several material respects which negate the entire basis for its argument as to why the writ should be issued.

Mitzi contends that it had no opportunity to move for judgment as a matter of law ("JMOL") under Rule 50(a) F.R.Civ.P., because the District Court did not make a patent claim construction ruling until after the opportunity to make a JMOL motion had passed. This is factually incorrect.

First, the District Court made a claim construction ruling long before trial. A Magistrate Judge made a construction in a recommendation dated February 3, 2004, which recommendation was approved and ordered by the District Judge on June 22, 2004. The trial did not begin until November 29, 2004, more than five months later. The parties should have assumed that the claim construction would remain in effect for trial. Thus, based on that claim construction, Mitzi could have moved for JMOL under Rule 50(a) at the close of the evidence. Mitzi made no Rule 50(a) motion.

Second, at the close of all testimony, on December 1, 2004, the District Court, after sending the jury home for the evening and hearing Romag's Rule 50(a) JMOL motions (Court of Appeals Appendix A668-A673), announced to counsel for the parties a proposed claim construction to be included in the jury charge (Tr. 343-344). Both counsel asked to consider the claim construction overnight and the trial was adjourned for the evening (Tr.345). The following morning, December 2, 2004, the parties commented upon and stated their objections to the proposed jury charge (Tr.350-366).

Romag objected to the claim construction. Mitzi did not. The Court then said, "Anything else we need to do on the record?" (Tr.366). Mitzi's counsel did not respond by making a Rule 50(a) motion or otherwise. The Court then recalled the jury, the parties gave closing arguments, the Court read the charge, and the jury retired to deliberate.

Mitzi also contends that the District Court's amended claim construction was such that it would have mandated JMOL in favor of Mitzi. Again, this is not factually correct.

First, the amended claim construction did not substantially change the initial claim construction. The initial construction by the Magistrate Judge, as adopted by the District Judge, concluded that the term "rotatable" in claim 3 of Romag's Patent No. 5,722,126 meant that the attachment legs were "capable of being rotated" (A238).

The amended claim construction stated:

> I instruct you that for purposes of this lawsuit, rotatable means capable of being rotated and not rigidly secured. The pair of legs is not rigidly secured if it does not resist rotation. Rotatable, however, does not imply that the legs must rotate freely. The definition of rotatable should be considered in light of the reasons that the legs were made rotatable, which was to allow coating solutions to reach all surfaces of the fastener thereby giving greater corrosion protection. (A737-38).

Romag objected to that claim construction. Mitzi did not (A681-90).

Obviously, the precise words of the amended claim construction are not the same as those in the initial claim construction. The jury was given latitude to determine the degree of resistance to rotation required for infringement. Resistance must be low enough to permit rotation, but not so low that the parts rotate "freely". After reviewing the evidence and the testimony, the jury was entitled to reach a verdict in favor of Romag by applying the Court's claim construction.

Second, if the amended claim construction precluded judgment for Romag, as Mitzi now contends, them Mitzi should have been quick to move for JMOL under Rule 50(a) after the amended claim construction was made and before the jury was reconvened to hear closing arguments and the charge. Mitzi did not do so. This failure to move precluded Romag from putting on any additional testimony to ensure that there was sufficient evidence to support the jury verdict.

REASONS FOR DENYING THE PETITION

I. The Federal Circuit Followed The Long-Established Practice That A Rule 50(b) Motion Requires The Prior Making Of A Rule 50(a) Motion.

A. The Federal Rules of Civil Procedure Clearly Require That A Motion For Judgment Be Made Before Submission Of the Case To The Jury.

Mitzi suggests that there is no clear authority requiring that a Rule 50(a) motion be made in order to bring a Rule 50(b) motion. To the contrary, the Federal Rules of Civil Procedure are crystal clear that this is necessary and the appellate decisions confirming that requirement are legion. *See United States ex rel. A+ Homecare, Inc. v. Medshares*

Mgmt. Group, Inc., 400 F.3d 428, 447 (6th Cir. 2005) ("It is well-settled that a court can only consider a motion for a judgment notwithstanding the verdict *only if* the moving party has previously made a motion for a directed verdict at the close of all the evidence."); *Collado v. United Parcel Serv Co.*, 419 F.3d 1143, 1152, n. 6 (11th Cir. 2005); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 638 (7th Cir. 2003). The cases cited by Mitzi to the contrary are inapposite or do not support Mitzi's position.[1]

There is good reason for strict adherence to the Rule 50(a) requirement. The purpose of the rule is to alert the opposing party to the supposed deficiencies in its proof. This gives the non-moving party an opportunity to cure any deficiency in the proof that may have been overlooked. *See Broadnax v. City of New Haven*, 415 F.3d 265, 268 (2d Cir. 2005); *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 960 (5th Cir. 1998). To allow a JMOL motion to be filed for the first time post-verdict precludes the non-moving party from curing the defects and thereby obtaining its constitutional right to a jury trial.

Mitzi suggests that any JMOL motion must be made at the precise time that the evidence closes, or at the particular time that the Court schedules to hear JMOL motions. To the contrary, Rule 50(a) F.R.Civ.P. states that a motion for JMOL "may be made at any time before submission of the case to

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1. For example, in *Cruz* (Mitzi Br. 19), the Second Circuit reiterated the necessity for a Rule 50(a) motion before bringing a Rule 50(b) motion. The same is true of the Seventh Circuit's decision in *McKinnon* (Mitzi Br. 19), and the Ninth Circuit's decision in *Pierce* (Mitzi Br. 11). In *John Hopkins* (Mitzi Br. 13) there had been a motion under Rule 50(a) during trial, and in *Scottish Heritable Trust* (Mitzi Br. 19), there had been an objection to the jury instruction.

the jury." A case normally is submitted to the jury when the jury is sent to the jury room for deliberations. Indeed, in some cases, a Rule 50(a) motion may be made even after the jury has retired but before deliberations have begun. 9 Moore's Federal Practice §50.20[1] (2001).

Rule 50(b) F.R.Civ.P. deals only with renewed motions for JMOL. Rule 50(b) applies only where a court does not grant a JMOL motion before the case is submitted to the jury. It is intuitively obvious that a party cannot "renew" a motion which it has not previously made. Therefore, the failure to make a Rule 50(a) motion before the jury has retired to deliberate normally means that a party cannot make a Rule 50(b) motion after the verdict.

B. The Unitherm Case Does Not Change The Law In Any Manner Favorable To Petitioner.

Mitzi relies heavily upon the recent decision in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. __, 126 S. Ct. 980, __ L. Ed. 2d __ (2006). Mitzi contends that *Unitherm* requires that Rule 50 be interpreted liberally and consistently with principles of fairness.

Unitherm involved a party making a Rule 50(a) JMOL motion, but failing to renew the motion post-verdict under Rule 50(b). This, of course, is the opposite of the present situation. Here, Mitzi failed to make the Rule 50(a) motion and then sought to make the motion post-verdict under Rule 50(b). Both the majority and dissenting opinions in *Unitherm* agreed that the right to trial by jury might be impacted if no Rule 50(a) motion is made. (Compare 126 S. Ct. at 986, n. 4, with Dissent at 990, footnote). Thus, there can be no disagreement that to vacate a jury verdict as a matter of law

when no Rule 50(a) motion had been made would deprive the non-moving party of its constitutional right to trial by jury.

Contrary to Mitzi's contention, and to the extent applicable at all to this case, *Unitherm* reiterates the long-established practices that a litigant must comply with the procedures before the District Court or it will be precluded from raising the issue on appeal, and that an Appellate Court is not permitted to excuse non-compliance with Rule 50 in the District Court and thereby review the jury verdict for sufficiency of the evidence except for rare exceptions not applicable here. *Unitherm* does not help Mitzi in this case.

C. Petitioner Had Sufficient Opportunity And Motivation To Make A Rule 50 (a) Motion In The District Court.

Despite its claim to lack of opportunity, Mitzi had the chance to make a Rule 50(a) motion, but either chose not to do so or simply failed to do so.

First, as explained above, Mitzi could have made a Rule 50(a) JMOL motion at the close of evidence and before submission to the jury based on the initial claim construction made as a result of a summary judgment motion. Mitzi stood mute.

Second, Mitzi could have made a Rule 50(a) JMOL motion based on the amended claim construction after the charge conference and before closing arguments, the jury charge and the submission of the case to the jury. The amended claim construction was, in essence, a jury instruction, and Mitzi had an opportunity to seek JMOL once

the instruction was finalized. Again, Mitzi stood mute, despite the Court's invitation following the charge conference to raise any additional issues for the record (Tr.366).

Clearly, Mitzi's failure to move for JMOL until after the jury reached a verdict was a matter either of its own trial strategy or of its counsel's inattention. As the dissenting opinion noted in *Unitherm*, "Murphy's law applies to trial lawyers as well as pilots. Even an expert will occasionally blunder." (Dissent at 989).

D. The Court Of Appeals Properly Affirmed The District Court's Denial Of The Rule 50(b) Motion.

Mitzi complains that the Court of Appeals for the Federal Circuit gave short shrift to its argument that its Rule 50(b) motion should not have been denied. Here, the Federal Circuit affirmed the District Court without opinion under Rule 36 F.R.A.P. Since the standard for review of the denial of a Rule 50(b) motion is whether there was a complete absence of evidence such that the jurors could not arrive at the verdict, *Samuels v. Air Transp Local 504*, 992 F.2d 12, 14 (2d Cir. 1993); *Stratton v. Dep't for the Aging of New York*, 132 F.3d 869, 878 (2d Cir. 1997), the Federal Circuit's affirmance can be read simply as a determination that there was not a complete lack of evidence. Thus, the jury verdict should stand.

II. This Case Involves No Constitutional Issues Or A Split Of Authority Warranting Consideration By This Court.

Mitzi postures this case as presenting an interesting question of law or as a request for guidance in interpreting precedents. Nothing could be further from the truth.

This case is no more than a straight-forward patent infringement action whose outcome is of interest only to the parties. There was a jury verdict for Romag. Mitzi failed to preserve its legal position to challenge the verdict, or at least embarked on a trial strategy which did not take that situation into account. Mitzi did not like the jury verdict and then sought to deprive Romag of the fruits of victory. The District Court declined to interfere with the verdict and the Court of Appeals agreed. The case is over. Mitzi's complaints are too little and too late.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN H. ZIVIN
Counsel of Record
COOPER & DUNHAM LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 278-0400

DONALD R. DUNNER
FINNEGAN, HENDERSON,
FARABOW,
GARRETT & DUNNER, L.L.P.
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000

Attorneys for Respondent

July 12, 2006

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IN THE

Supreme Court of the United States

MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD.,

Petitioner,

v.

ROMAG FASTENERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL A. PASKIN
Counsel of Record

825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1760
Facsimile: (212) 474-3700

J. Wes Earnhardt
Jessica R. Buturla
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

July 31, 2006

CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The disclosure statement at p. ii of Petitioner's June 12, 2006, Petition for Writ of Certiorari is still accurate.

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9 James W. Moore et. al., *Moore's Federal Practice* §50.20[1] (2001) 7

INTRODUCTION

Romag presents no valid challenge to the two basic considerations here that warrant Supreme Court review.

First, contrary to Romag's assertions, there are situations that warrant making an exception to the general rule that a Rule 50(a) motion at the close of the evidence is a prerequisite to a Rule 50(b) motion. This case presents exactly the sort of procedural fact pattern that warrants an exception. It is consistent with the decisions of this Court and the Circuit Courts to permit a dispositive issue of law to be first brought to the court's attention on a Rule 50(b) motion when, as here, the purposes of the Rule are otherwise satisfied. Romag does not even attempt to challenge Mitzi's demonstration that both this Court and the Circuit Courts have interpreted and applied Rule 50's requirements not literally and categorically, but consistent with its purposes.

Mitzi's law of the case argument plainly was not available until after the close of the evidence, and after Rule 50(a) motions were invited, considered and decided by the court. In granting summary judgment with respect to the '926 patent, the District Court had held:

> "Even a cursory examination of the samples establishes that they do not contain attachment legs which can be rotated using only one's hands. Accordingly, even if the attachments legs could be rotated with the assistance of hand tools, no reasonable juror could find that they do not 'resist' rotation." *Romag Fasteners, Inc. v. Mitzi Int'l Handbag & Accessories Ltd.*, 323 F. Supp. 2d. 512, 523 (S.D.N.Y. 2004).

Then, in construing Claim 3 of Romag's '126 patent at trial, the District Court gave the following instruction to the jury:

> "For purposes of this lawsuit, 'rotatable' means capable of being rotated and not rigidly secured. The pair of legs

> is not rigidly secured if it does not resist rotation". (J.A. 737)[1].

The argument that the combined effect of the District Court's summary judgment ruling and jury instructions mandates a finding of non-infringement was thus not available to Mitzi until after the court amended its construction of the '126 patent. The next available opportunity under the rules to bring this argument to the court's attention was in a post-trial Rule 50(b) motion.

In response, Romag asserts that the amended claim construction "did not substantially change the initial claim construction". (Opp. at 3.) That is wrong. Specifically, the amended construction of the '126 patent included a requirement not included in the initial construction – that the pair of attachment legs must be "not rigidly secured", meaning it "does not resist rotation". (J.A. 737.) Held against the District Court's summary judgment decision, that additional requirement mandated a judgment of non-infringement with respect to the '126 patent as a matter of law. (Pet. at 6-8.) Romag's suggestion that the change was not "substantial" is absurd, as the change meant the difference between not quite matching and precisely matching what the court had previously ruled as a matter of law were the characteristics of the accused snaps.

Romag also asserts that Mitzi had "sufficient opportunity" to raise its law of the case argument in a Rule 50(a) motion. Romag cites no authority, however, to support their assertion that a Rule 50(a) motion would have been procedurally proper at any point after the amended claim construction was articulated by the court. In fact, Mitzi

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[1] "J.A. __" refers to the Joint Appendix filed in the Court of Appeals for the Federal Circuit; "Pet. at __" refers to pages of the Petition for Writ of Certiorari; "Opp. at __" refers to pages of Respondents' Brief in Opposition.

raised its argument at the next opportunity specifically afforded it under the Rules – in a post-trial Rule 50(b) motion.

Second, Romag argues that certiorari should be denied because the decision below involves only a unique fact-bound application of settled law, with no implications beyond the parameters of this case. Again, Romag is wrong. This petition raises for this Court's consideration an issue of critical importance to the fair and uniform administration of federal trial and post-trial procedure, specifically as it relates to patent actions in district courts throughout the country and in the Federal Circuit. Neither the express language of Rule 50 nor current caselaw provides guidance to litigants as to how to navigate the procedural issue presented here – *i.e.*, when grounds for judgment as a matter of law arise after the close of the evidence and after Rule 50(a) motions have been invited and decided by the court. This guidance is particularly important in the context of patent litigation where, after this Court's decision in *Markman v. Westview Instruments*, 517 U.S. 370 (1996), courts are free to and often do construe patent claims throughout the course of proceedings, including in framing jury instructions. (Pet. at 13-14.)

Furthermore, as made clear in Romag's opposition, this Court should take this opportunity to clarify the requirements of this Court's decision in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. ___, 126 S. Ct. 980 (2006), lest the decision be read, as Romag suggests, in a manner that is inconsistent with the long-standing requirement that there can be no waiver where there is not the "intentional relinquishment" of a "known right". *U.S. v. Olano*, 507 U.S. 725, 733 (1983).

REASONS FOR GRANTING THE WRIT

I. There Are Exceptions to the General Rule that a Prior Rule 50(a) Motion Is a Prerequisite to a Post-Judgment Rule 50(b) Motion, and Such an Exception Is Warranted in this Case.

The District Court's decision in this case, affirmed by the Federal Circuit without an opinion, is a consequence of the procedural accident that the grounds on which Mitzi moved for judgment as a matter of law did not exist when a Rule 50(a) motion would have been procedurally appropriate. As Mitzi argued in its Petition, the rigid application of Rule 50 employed by the District Court and the Federal Circuit in this case produces an illogical and manifestly unjust result. (Pet. at 10-15.)

Despite Romag's assertion to the contrary (Opp. at 4), Mitzi does not dispute that by failing to bring a Rule 50(a) motion at the close of the evidence, a party can, and, as a general matter, does, waive the right to bring a subsequent motion pursuant to Rule 50(b). (Pet. at 10-11.) However, Romag is wrong that a Rule 50(b) motion "deals *only* with renewed motions for JMOL" and "applies *only* where a court does not grant a JMOL motion before the case is submitted to the jury". (Opp. at 6 (emphasis added).) When, as here, the grounds for that motion arise after a Rule 50(a) motion would be procedurally appropriate, the next opportunity specified by the Rules for a party to move the court is in a post-verdict Rule 50(b) motion, and the general prohibition against raising arguments for the first time after trial does not and ought not apply. (Pet. at 10-12; 18-20); *see also Reed v. Ross*, 468, U.S. 1, 16 (1984) ("if novelty were never cause [for failure to raise an argument], counsel . would be obliged to raise and argue every conceivab . . . claim, no matter how far fetched, in order to preserve a right for . . . relief upon some future unforeseen development" (internal citation omitted)). Thus, for example, in *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366 (9th Cir. 1987), the Ninth Circuit

held that a Rule 50(a) motion at the close of evidence was not necessary to preserve the Rule 50(b) motion that was premised not on a review of the sufficiency of the evidence but on inconsistencies in the answers given in the jury's special verdict that could not have been known at the close of the evidence.

Romag's arguments to the contrary are not only wrong, they reinforce Mitzi's argument that this case warrants an exception to the general rule.

First, Romag argues that bringing a potentially dispositive issue of law to the district court's attention, as an initial matter, in a post-verdict Rule 50(b) motion is strictly impermissible because it would "preclude[] the non-moving party from curing the defects and thereby obtaining its constitutional right to a jury trial." (Opp. at 5.) Romag correctly identifies the two purposes that animate Rule 50 — protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of any alleged deficiencies in proof to permit an attempt to cure it before resting. (Pet. at 16-19.) Romag is incorrect, however, that in all cases those purposes dictate the categorical enforcement of the waiver rule. Rather, consistent with the decisions of this Court, the Circuit Courts have held that "rigid application of [Rule 50(b)] is inappropriate . . . where such application serves neither of the rule's rationales". *FSLIC v. Reeves*, 816 F.2d 130, 138 (4th Cir. 1987); *Pierce*, 823 F.2d at 1369; (Pet. at 19-21).

Here, Seventh Amendment considerations do not apply because the issue at hand is a question of law that was properly directed to the district court and not the jury. *See Benson v. Aliphin*, 786 F.2d 268, 274 (7th Cir. 1986). Concerns of notice are also inapposite because the defect is legal rather than evidentiary – the law of the case compels a finding of non-infringement here regardless of the proof offered by Romag, and consideration of Mitzi's motion

would thus not have impaired Romag's procedural right to cure evidentiary deficiencies. *See, e.g., Baskin v. Hawley*, 807 F.2d 1120, 1134 (2d Cir. 1986) ("[T]he very purpose of Rule 50(b)'s requiring a prior motion for a directed verdict is to give the other party an opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury." (internal quotation marks and citations omitted)).[2] Notably, Romag does not even hint at what additional evidence it could possibly have presented to cure the "defects" raised by Mitzi's Rule 50(b) motion.

Second, Romag argues that Mitzi had "sufficient opportunity" to make its law of the case argument on a Rule 50(a) motion and plainly failed to do so, thereby waiving its right to bring a Rule 50(b) motion. (Opp. at 7.) Again, Romag is wrong.

Romag's assertion that "Mitzi could have made a Rule 50(a) motion at the close of evidence and before submission of the case to the jury based on the *initial* claim construction made as a result of a summary judgment motion" (Opp. at 2, 7 (emphasis added)), is nonsensical, and demonstrates that Romag either misunderstands or intentionally has mischaracterized Mitzi's argument.

The grounds for Mitzi's motion did not exist until after the claim construction was amended – that is, Mitzi could not have made its law of the case argument until *after* the District Court set forth its amended claim construction in the jury instructions. (Pet. at 8-9.) Contrary to Romag's repeated assertions, Mitzi could not have made the same argument "based on the initial claim construction" (Opp. at

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[2] Romag's attempts to distinguish a handful of the legion of cases cited by Mitzi to support this interpretive approach fail, and again only highlight that courts should and do make exceptions to allow Rule 50(b) motions where consistent with the purposes of the Rule. (Opp. at 5 n.1.)

7), because that initial claim construction did not include the dispositive requirement that the attachment legs must be "not rigidly secured" (Pet. at 8). Indeed, as noted in the Petition (Pet. at 9 n.3), even if Mitzi had made an earlier motion for judgment as a matter of law, such a motion would not have been specific enough to preserve Mitzi's ability to raise its law of the case argument after trial. *See* Fed. R. Civ. P.50(a)(2) ("Such a motion shall specify ... the law and the facts on which the moving party is entitled to the judgment."); *Lambert v. Genessee Hosp.*, 10 F.3d 46, 54 (2d Cir. 1993) (earlier motion preserves only those arguments "specifically raised in the prior motion") (internal citation omitted).[3]

Romag also asserts that "Mitzi had the opportunity to seek JMOL once the [jury] instruction was finalized" and the revised claim construction was articulated by the court, but before the jury was sent to the jury room for deliberations. (Opp. at 7-8.) Romag correctly notes that subsection (a) of Rule 50 states that "[m]otions for judgment as a matter of law may be made at any time before submission of the case to the jury", but cites no authority for its assertion that "a case normally is submitted to the jury when the jury is sent to the jury room for deliberations." (Opp. at 6.)[4] In fact, as

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[3] Romag's attempt to make something of the fact that Mitzi did not object to the proposed jury charge is similarly misplaced. (Opp. at 3.) Since the jury instruction was favorable to Mitzi – so favorable that it required entry of judgment as a matter of law – it would have made no sense for Mitzi to object to it. Indeed, it was Romag that objected to the relevant language in the court's claim construction, plainly realizing that such a construction would be fatal to its claim of infringement. (*See* J.A. 682-684.)

[4] Romag merely notes that in some cases, Rule 50(a) motions have been made and granted after the jury has retired but before deliberations have begun, citing 9 James W. Moore et. al., *Moore's Federal Practice* §50.20[1] (2001). (Opp. at 6.) Indeed, in the one case cited by *Moore's* for this proposition, the court describes a motion made after the jury has begun deliberations as "untimely" but allows its grant to stand, noting

Mitzi explained in its Petition, subsection (b) of Rule 50 equates "submission of the case to the jury" with "the close of all the evidence". Fed. R.Civ. P. 50(b); (Pet. at 12). The District Court did not articulate its new claim construction of the '126 patent until after it stated, "Members of the jury, that concludes the presentation of evidence in this trial", (J.A. 666), and moments later stated to the parties, "I will take motions now" (J.A. 668). Therefore, the plain language of Rule 50 suggests that the period during which a Rule 50(a) motion would have been timely had passed before the grounds for Mitzi's motion for judgment as a matter of law became available, because the case had already been "submitted to the jury".

As Mitzi explained in its Petition (Pet. at 11-12), while counsel could have sought leave of the court to file an undetermined motion during the time highlighted by Romag, in a form and manner not specified by the Rules, the right (and obligation) to make such a motion is not clear from the text of the Rule. As such, Mitzi's failure to have taken those novel and extraordinary steps can hardly be construed as an "intentional relinquishment or abandonment of a known right" that could have waived its ability to have a dispositive issue of law considered by the court. *See Olano*, 507 U.S. at 733.

This Court should take this opportunity to provide litigants with necessary guidance regarding how to navigate Rule 50 in this context.

"we have been willing to excuse a failure to strictly comply with the requirements of Fed.R.Civ.P. 50 so long as the purposes of the rule are satisfied". *Serna v. City of Antonio*, 244 F.3d 479, 481-82 (5th Cir. 2001).

II. This Court Should Grant Certiorari to Clarify Rule 50 and its Recent Decision in *Unitherm*.

In its Petition, Mitzi explained that although this Court has never addressed the question whether and to what extent an issue can be raised as an initial matter on a Rule 50(b) motion, this Court's Rule 50 decisions, including most recently its decision in *Unitherm*, and Circuit Court decisions addressing waiver in the Rule 50(b) context are consistent with Mitzi's position.

Romag's argument that *Unitherm* does not abrogate Rule 50(b)'s requirement misses the point. In *Unitherm*, this Court held that failure to renew a pre-verdict 50(a) motion in a post-verdict 50(b) motion precluded the appellate court from reviewing the sufficiency of the evidence on appeal where the party also failed to move for a new trial. 126 S. Ct. at 987. As Romag notes, this Court expressed concern that to hold otherwise could potentially pose Seventh Amendment concerns. *Id.* at 986 n.4. While attention to the purposes of the Rule required this Court, in *Unitherm*, to require a 50(b) motion prior to appeal, the decision does not require the categorical application of a rule of strict waiver in all Rule 50 contexts. Rather, *Unitherm* appears once again to ratify the interpretive approach used by Circuit Courts which, incorporating this Court's "principles of fairness" into their own decisions regarding Rule 50, have taken a purpose-oriented approach to the application of the pre-verdict motion requirement and held that where the purposes of Rule 50 are satisfied, review of an issue in a Rule 50(b) motion that was not raised in a Rule 50(a) motion at the close of the evidence is indeed proper. *See, e.g., FSLIC*, 816 F.2d at 137-38; *Pierce*, 823 F.2d at 1369; (Pet. at 19-21).

This Court should take this opportunity to clarify, consistent with the Circuit Courts, how the Rule's articulated purposes dictate the application of Rule 50(b) in this context.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to review the decision of the Federal Circuit Court of Appeals.

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MICHAEL A. PASKIN
Counsel of Record

825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1760
Facsimile: (212) 474-3700

J. Wes Earnhardt
Jessica Buturla
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

Attorneys for Petitioner